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89- 1439

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

CENTRAL FLORIDA CLINIC
FOR REHABILITATION, INC., Petitioner

v.

CITRUS COUNTY HOSPITAL BOARD
and BEVERLY ENTERPRISES, a
California corporation d/b/a
BEVERLY-GULF COAST, INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT A PUBLIC CORPORATION ORGANIZED AND EXISTING UNDER A SPECIAL LEGISLATIVE ACT WHICH DOES NOT EXPRESSLY OR IMPLIEDLY GRANT ANY POWER TO DISPLACE COMPETITION IS ENTITLED TO STATE ACTION IMMUNITY FROM ANTITRUST LIABILITY IN LIGHT OF A CLEAR LEGISLATIVE POLICY FAVORING COMPETITION.

PARTIES TO PROCEEDING IN LOWER COURT

Central Florida Clinic For Rehabilitation, Inc.

Citrus County Hospital Board

Beverly Enterprises, d/b/a Beverly-Gulf Coast, Inc.

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TABLE OF CITATIONS

Other Authority

Central Florida Clinic for Rehabilitation, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 888 F.2d 1396. The opinion of the district court is not reported.

JURISDICTION

The decision of the Eleventh Circuit was entered on September 27, 1989. Rehearing was denied on December 14, 1989.

This court has jurisdiction pursuant to 28 U.S.C. Section 1254.

STATUTORY PROVISIONS INVOLVED

1. Title 15, United States Code, Section 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise,

> or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

2. Title 15, United States Code, Section 2, provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...

STATEMENT OF THE CASE

I

STATEMENT OF THE PROCEEDINGS BELOW

Central Florida Clinic for Rehabilitation, Inc. ("CFCR") commenced this multi-count antitrust action against respondents on March 31, 1987. Beverly Enterprises ("Beverly") answered the complaint. Citrus County Hospital Board ("the Board") responded by moving for summary judgment and asserting that, even assuming the facts alleged in the complaint to be true, its conduct was pursuant to an express grant of state legislative authority and that it is therefore immune from antitrust liability. Thereafter, discovery was taken. Pleadings were amended.

> In the Third Amended Complaint, [CFCR] alleges that the Board violated §§ 1 and 2 of the Sherman Act in three ways. First, the Board allegedly

> attempted to monopolize and conspire (with Beverly) to monopolize patient therapy services in Citrus County, Florida, (Counts I and II). Second, [CFCR] claims that the Board used monopoly power in one market (hospital patient care) as leverage to compete unfairly in another market (out-of-hospital patient therapy services) (Counts III and IV). Third, the Board allegedly agreed with Beverly to deal reciprocally between themselves, in transferring patients and providing out of hospital patient therapy services, producing an unreasonably anticompetitive restraint of trade (Counts V and VI).[1]

In response, the Board again moved for summary judgment admitting anticompetitive conduct and asserting that its acts were pursuant to an express grant of legislative authority contemplating anticompetitive conduct and

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[1]Order granting the Board's motion for summary judgment, Appendix at 4-5.

that it is immune from liability for any resultant anticompetitive consequences.

On January 9, 1989, the district court found that:

> [T]he Florida legislature evinced a state policy that contemplates the occupation of parts or all of the particular field of delivering patient care, treatment, and services throughout Citrus County to the displacement of competition. The Board's allegedly anticompetitive conduct was a foreseeable consequence of the legislature's delegation of power to the Board.[2]

It then granted the Board's amended motion for summary judgment as to Counts I-VI of the third amended complaint.

Thereafter, the district court found that, since the Board is immune from antitrust liability, summary judgment

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[2]Order granting the Board's motion for summary judgment, Appendix at 24.

should be granted in favor of Beverly.[3] Having disposed of the federal question, the court then dismissed the pendent state claims against the Board.

It was from the finding that the Florida legislature articulated a policy which clothed the Board with immunity from antitrust liability and under which Beverly finds protection, that appeal was taken.

Oral argument was heard by a panel consisting of Circuit Judges Fay and Kravich and District Judge Myron Thompson. On September 27, 1989, the district court's decision was affirmed without opinion. 888 F.2d 1396 (11th

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[3]Oral opinion with respect to Beverly's motion for summary judgment, Appendix at 33.

Cir. 1989). CFCR's request for rehearing was denied on December 14, 1989.

II

STATEMENT OF THE FACTS

The Board is a public non-profit corporation which was created under Chapter 65-1371, Laws of Florida, for the purpose of acquiring, building, constructing, maintaining, expanding, repairing, altering, equipping, operating, and leasing proposed and existing county hospitals, medical nursing, and convalescent homes for Citrus County, Florida. It is governed by trustees appointed by the governor. It has taxing authority. It is authorized to issue bonds, acquire real and personal property, and adopt necessary rules and regulations for the operation of its hospitals, medical nursing homes, and convalescent homes.

The Board's enabling legislation was amended by Chapters 69-944 and 70-101, Laws of Florida. Those amendments allow increased interest rates and the operation of an ambulance service by the Board.

The Board does not have the power of eminent domain. Its enabling legislation as amended makes no reference to competitive or anticompetitive activities.

CFCR is a corporation engaged in the business of providing physical, occupational, and speech therapy in Citrus County.

Beverly is a corporation engaged in the operation of nursing homes throughout the country, including Citrus County. As a necessary adjunct to its operations, Beverly requires physical, occupational, and speech therapy for its patients.

Prior to the commencement of this action, CFCR and Beverly had a business relationship under which CFCR provided Beverly with physical, occupational, and speech therapy.

Subsequently, Beverly and the Board entered into a contract under which the Board would provide the same services that had been previously provided by CFCR to Beverly.

CFCR contends that the relationship between the Board and Beverly is violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

For the purposes of its motion for summary judgment, the Board admits that its activities violate the Sherman Act, but asserts that it is immune from antitrust liability under the state action doctrine.

REASONS FOR GRANTING THE PETITION

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT

The per curiam affirmance of the district court's decision that the Board enjoys state action immunity from antitrust liability is an extension of, and a departure from, the criteria recognized by this Court in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), and City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978). Moreover, it sanctions an extension of state action immunity into an area in which clear legislative intent is procompetitive.

To establish state action immunity for the Board, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state

policy.'" City of Lafayette v. Louisiana Power & Light Co., supra, (plurality opinion of Brennan, J.).

Here, for the Board to have state action immunity, special enabling legislation, which in no way refers to competition, must be found to be the basis of protection from liability under the Sherman Act. CFCR suggests that such a finding is contrary to decisions of the Supreme Court and controlling precedents of this court.

Starting with the seminal case of Parker v. Brown, 317 U.S. 341 (1943), this Court stressed that the Sherman Act was not intended to "restrain state action or official action directed by a state." Id. at 351. With the lone exception of Patrick v. Burget, 108 S.Ct. 1658 (1988), the ensuing cases of this Court that have expanded and refined the

state action doctrine have involved public utilities, common carriers, cable television franchises, regulation of alcoholic beverages, and the like. In other words, the state action doctrine has developed over time in the context of industries that are traditionally regulated quite heavily by the states. It is in this light that the Supreme Court has repeatedly held that challenged anticompetitive conduct must be engaged in pursuant to a clearly articulated and affirmatively expressed "state policy to displace competition with regulation or monopoly public service." Community Communications Co. v. City of Boulder, 455 U.S. 40, 51 (1982). (Emphasis added).

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), this Court refused to find state action in the promulgation

of minimum fee schedules by a state bar association. These schedules were not mandated by ethical standards established by the Virginia Supreme Court, the policy-making body. This Court held in pertinent part that "it is not enough that anticompetitive conduct is 'prompted' by state action...." Id. at 791.[4] This Court continued to expound on this concept in New Motor Vehicle Board of the State of California v. Orrin W. Fox Co., 439 U.S. 96 (1978). At issue there was a California program that mandated state approval of the location of new automobile dealerships. In

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[4] In Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985), the Court explained that state action immunity was not available in Goldfarb "only because the state as sovereign did not intend to do away with competition among lawyers." 471 U.S. at 64 (emphasis in original).

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), this Court explained how this specific statutory framework to regulate the sale of cars satisfied the first prong of its test: "The 'clearly articulated and affirmatively expressed' goal of the state policy was to 'displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships.'" 445 U.S. at 105 (quoting Orrin Fox, 439 U.S. at 109).

Building on these examples of clear articulation and affirmative expression of state policy is the case of Town of Hallie v. City of Eau Claire, supra.

Significant is Town of Hallie's rejection of an "active state supervision" prerequisite to state action immunity for municipalities. This Court stressed the fundamental differences

between municipalities and private actors for purposes of measuring state action immunity:

> [Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the state.

471 U.S. at 47; accord id. at 45 ("A private party...may be presumed to be acting primarily on his or its own behalf"). Although this Court noted that, in the case of municipalities, a "clear articulation and affirmative expression" standard can be derived from legislative intent even in the absence of any express statement regarding anticompetitive conduct, the decision makes abundantly clear that the anticompetitive conduct must be foreseeable and supported by statutory provisions which plainly show that "the

legislature contemplated the kind of action complained of."[5] Id. at 41-42; 42-44.

Noteworthy is this Court's stating twice in Town of Hallie that the state statutes involved there "evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation in the area of municipal provision of sewage services." Id. at 44; see also id. at 47 ("clearly articulated state policy to replace competition in the provision of sewage services with regulation".).

Read together, these cases indicate that this Court has not retreated in the least from requiring state action immunity to depend on a clear state

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[5] See Note 6.

policy to displace competition with regulation or monopoly public service.

A special enabling act, such as that creating the Board, that authorizes, rather than mandates, certain conduct is insufficient to support a finding of a clearly articulated and affirmatively expressed policy to displace competition with regulation or monopoly public service. Town of Hallie, 471 U.S. at 42 n.5.

Here, there are express procompetitive legislative indications that the State of Florida favors free competition in the health care area. In determining the existence or scope of state action immunity, it is necessary to examine the cumulative effect of all statutes that have a bearing on the issue. Auton v. Dade City, 783 F.2d 1009, 1011 (11th Cir. 1986). Florida's

Health Care Facilities and Health Services Planning Act, §§381.493-.498, Fla. Stat. (1985), must therefore be taken into account. This enactment contains a clear expression of procompetitive legislative intent in the health care area, as evidenced by Section 381.493(2), Florida Statutes (1985), which affirmatively states, "It is intended that strengthening of competitive forces in the health services industry be encouraged." (emphasis added). Factoring that specific statement of legislative intent into the entire legislative scheme results in the cumulative finding of a clearly articulated and affirmatively expressed state policy in favor of competition.

An analysis of the 1987 amendments shows an even greater degree of preemptive health care regulation by the

state. For instance, under Section 381.702, Florida Statutes, a certificate of need issued by the Department of Health and Rehabilitative Services is contemplated for "... a new, converted, expanded, or otherwise significantly modified health care facility, health service, or hospice." Of even more significance is the legislature's current "clearly articulated state policy" that:

> [T]he [Department of Health and Rehabilitative Services] is designated as the single state agency to issue, revoke, or deny certificates of need and to issue, revoke, or deny exemptions from certificate of need review in accordance with the district plans, the statewide health plan, and present and future federal and state statutes. The department is designated as the state health planning agency for purposes of federal law. (Emphasis added).

Fla. Stat. § 381.704(1) (1987).

In affirming the judgment below, the circuit court apparently agreed with the

district court's finding that the Board's enabling legislation expresses a clearly articulated state policy conferring immunity on the Board from antitrust liability.

The Eleventh Circuit's decision in Commuter Transportation Systems v. Hillsborough County Aviation Authority, 801 F.2d 1286 (11th Cir. 1986), would at first seem consistent with that finding. However, upon further consideration, a different conclusion will be reached. Apparently, the Commuter Transportation panel did not deem it necessary to publish its analysis of the underlying enabling legislation and accepted Judge Kovachevich's earlier finding in Astro Limousine Service, Inc. v. Hillsborough County Aviation Authority, 647 F.Supp. 193, 195 (M.D. Fla. 1985), that:

> [T]he [A]uthority is engaging in the challenged activity

> pursuant to a "clearly articulated" state policy and the intent of the legislature is that the delegated actions of the Authority will have anticompetitive effects.

Commuter Transportation, 801 F.2d at 1290.

However, before making that finding, Judge Kovachevich carefully analyzed the Authority's enabling legislation, 647 F.Supp. at 194, finding that:

> [The] Hillsborough County Aviation Authority is a public governmental body created by the laws of the State of Florida, is located in Hillsborough County, Florida, and exercises the function of operating the Tampa International Airport. The Authority is given certain powers in connection with the operation of this airport as delineated in Chapter 83-424, Laws of Florida, Part II, Section 2.03, 2.07, and 2.19(g). This grant of legislative authority is broad and includes all aspects regarding the operation of the airports and that to do so, the authority must enter into exclusive and limited

agreements with various operators.

While powers similar to those granted to the Hillsborough County Aviation Authority ("the Authority") can be found in the Board's enabling legislation, many can not.

Section 2.19(g) of the Authority's enabling legislation provides:

> The Legislature recognizes that to further the policies and fulfill the objectives stated in this article, it is often necessary that the airports owned or operated by the Authority enter into exclusive or limited agreements with a single operator or a limited number of operators. The Authority's publicly owned or operated airports shall grant exclusive or limited agreements to displace business competition with regulation or monopoly service whenever the Authority determines, in consideration of the factors set forth in paragraph (h), that such agreements are necessary to further the policies and to fulfill the objectives stated in this section. The Legislature contemplates that the

> Authority's publicly owned or operated airports will grant exclusive or limited agreements in furtherance of the policy of this state to displace business competition by exclusive or limited agreements to fulfill these policies and objectives. (Emphasis added).[6]

No policy similar to that expressed in Section 2.19(g) can be inferred from the Board's enabling legislation.

In Town of Hallie v. City of Eau Claire, supra; Falls Chase Special Taxing District v. City of Tallahassee, 788 F.2d 711 (11th Cir. 1986); and Auton v. Dade City, Florida, supra, the authority granted by the state legislature to each

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[6]The emphasized language of Section 2.19(g) is almost identical with that used by Justice Brennan in Lafayette v. Louisiana Power & Light Co., 435 U.S. at 413, and adopted in Town of Hallie v. City of Eau Claire, 471 U.S. at 39. One would have to assume that the legislative draftsman had the opinions before him when Section 2.19(g) was prepared.

of the municipalities is consistent with allowable anticompetitive conduct, but only when the enabling legislation of each is considered together with specific statutory authority from which foreseeable monopolistic results can be clearly inferred. Hallie, 471 U.S. at 40-44; Falls Chase, 788 F.2d at 713-14; Auton, 783 F.2d at 1010-1011.

Here, in contrast, there is no general or statutory provision under which any allowable anticompetitive conduct might be inferred. In fact, general law is to the contrary, with the state reserving unto itself regulation of health care.

The district court's finding that "Section 3 [of the Board's enabling legislation] appears to authorize the Board to operate 'all hospitals' in the

county"[7] is too expansive and is inconsistent with general and statutory laws relating to, and limiting, hospitals.[8]

The Board's expansion into therapy services in competition with private enterprise is far different from water and sewer services which historically have been within the domain of municipalities.[9] See Falls Chase, 788 F.2d at 712; Auton, 783 F.2d at 1011.

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[7]Order granting the Board's motion for summary judgment, Appendix at _____.

[8]Unlike the municipalities in Falls Chase and Auton, the Board has not been granted eminent domain power.

[9]Of significance, the Board was, by amendment, granted specific authority to operate an ambulance system. Arguably, such a specific grant would not have been necessary if the powers granted to the Board were as broad as found by the court. More significant, the fact that the legislature determined that such a

(Footnote Continued)

If the Board had been given the express authority, as was the Authority under Section 2.19(g), to enter into exclusive contracts that are anticompetitive in nature, the arrangement between Beverly and the Board might be immune from federal and state antitrust laws.

To confer antitrust immunity on the Board necessitates a presumption that the Board can articulate its own immunity. That could only be accomplished under such "home rule" power as the Board might have and would, of course, contravene Community Communications Co. v. City of Boulder, supra. Falls Chase, 788 F.2d at 713; Auton, 783 F.2d at 1011.

(Footnote Continued)
specific authorization of power was necessary is a powerful indication that no articulated policy existed before.

Here, in order to obtain an exemption, the Board must "demonstrate that [its] anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with the regulation or monopoly public service.'" Town of Hallie, 471 U.S. at 37. (Emphasis added). This, it has not done.

There has been no expression of legislative intent consistent with City of Lafayette or Town of Hallie which can provide the Board with immunity.

Unless and until such time as the state clearly articulates a policy to the contrary, the Board is subject to federal and state antitrust regulation.

CONCLUSION

Accordingly, CFCR respectfully submits that issuance of a writ of certiorari is appropriate.

CERTIFICATE OF SERVICE

I certify that copy hereof has been furnished to Russell W. LaPeer, Donald A. Farmer, Jr., and James R. Pietrzak by mail this 13th day of March, 1990.

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APPENDIX

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CENTRAL FLORIDA CLINIC
FOR REHABILITATION, INC.,

Plaintiff,

vs. Case No. 87-71-Civ-Oc-12

CITRUS COUNTY HOSPITAL
BOARD and BEVERLY ENTERPRISES,
a California corporation d/b/a
BEVERLY-GULF COAST, INC.,

Defendants.

ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT

This cause is before the Court on the Amended Motion for Summary Judgment, as to Counts I through VI of the Third Amended Complaint, filed herein on August 30, 1988, by defendant Citrus County Hospital Board (hereinafter "Board"). A brief in support of said motion was filed herein on September 13, 1988. Plaintiff filed a response in opposition thereto on September 23, 1988. For the reasons

discussed below, the motion for summary judgment will be granted. The Court expresses no opinion and retains jurisdiction as to Counts VII through X of the Third Amended Complaint.

Rule 56(c), Fed. R. Civ. P., states that summary judgment shall be rendered if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Supreme Court explained the standard for summary judgment:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.

Id. at 322-323; Young v. General Foods Corp., 840 F.2d 825, 828 (11th Cir. 1988). In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986), the Court noted that "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." See Young, 840 F.2d at 828; Barnes v. Southwest Forest Industry, Inc., 814 F.2d 607, 609 (11th Cir. 1987) (equating standards for granting summary judgments and directed verdicts).

The Board's motion seeks summary judgment on the first six counts of the Third Amended Complaint, which counts allege violations of federal and state antitrust law. Plaintiff is a

corporation which is engaged in the business of providing physical, occupational and speech therapy within Citrus County, Florida. The Board is a public non-profit corporation created by the Florida Legislature to operate hospitals and medical nursing and convalescent homes in Citrus County. Defendant Beverly Enterprises, Inc., (hereinafter "Beverly") is also a corporation engaged in the business of providing physical, occupational and speech therapy within Citrus County.

In the Third Amended Complaint, plaintiff alleges that the Board violated §§ 1 and 2 of the Sherman Act in three ways. First, the Board allegedly attempted to monopolize and conspire (with Beverly) to monopolize patient therapy services in Citrus County, Florida, (Counts I and II). Second,

plaintiff claims that the Board used monopoly power in one market (hospital patient care) as leverage to compete unfairly in another market (out-of-hospital patient therapy services) (Counts III and IV). Third, the Board allegedly agreed with Beverly to deal reciprocally between themselves, in transferring patients and providing out-of-hospital patient therapy services, producing an unreasonably anticompetitive restraint of trade (Counts V and VI).[1]

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[1]The Florida Antitrust Act, Fla. Stat. § 542.01 et seq., was patterned after the Sherman Act, and was intended to complement and follow the federal court interpretations of the Sherman Act. Auton v. Dade City, Fla., 783 F.2d 1009, 1010 n.1 (11th Cir. 1986). The parties have recognized this in § 8 of the Pretrial Stipulation. Accordingly, the Court's ruling on Counts I, III, and V of the Third Amended Complaint, based on the Sherman Act, will apply as well to Counts II, IV, and VI of the Third Amended (Footnote Continued)

The parties have had adequate time for discovery,[2] and, for the purposes of the motion, there is no dispute as to the material facts. The Court is faced with the issue of whether the Board's allegedly anticompetitive actions are immune from the federal antitrust laws. Two aspects of state action immunity will be discussed in turn below: 1) whether the Board's conduct was pursuant to clearly expressed state policy which contemplated the kind of action complained of, and 2) whether plaintiff has proven an illicit conspiracy which

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(Footnote Continued)
Complaint, which assert parallel, corresponding charges under the Florida Antitrust Act, Fla. Stat. §§ 542.18 and 542.19.

[2]The Court entered an Order on April 6, 1988, which set August 1, 1988, as the last day for Court supervised discovery.

would exclude the Board from state action immunity.

State Policy

The first issue which must be addressed is whether the conduct with which the Board is charged in the Third Amended Complaint, assumed for purposes of summary judgment considerations to be true and to be anticompetitive, is immune from antitrust liability because carried out pursuant to clearly expressed state policy. The state action immunity stems from the Supreme Court's decision in Parker v. Brown, 317 U.S. 341 (1943). The Supreme Court held that neither the language, nor the legislative history, of the antitrust laws evinced an intent by Congress to preempt the power of the state to make and enforce state policies with anticompetitive consequences. Id. at 351-352. The Court refused to infer

an intent to nullify a state's control over its officers and agents in activities directed by the legislature. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38 (1985) (citing Parker, 317 U.S. at 351). State action immunity exists in the instant case if the Board was created pursuant to a clearly articulated and affirmatively expressed state policy which contemplates the Board's actions. See id. at 44.

The Board was created and empowered by a special enactment of the Florida Legislature entitled the "Citrus County Hospital and Medical Nursing and Convalescent Home Act" (hereinafter "CCH Act"). 1965 Fla. Laws 1371, 1969 Fla. Laws 944, and 1970 Fla. Laws 1001. The Citrus County Hospital Board was constituted to be an agency of Citrus County and was "incorporated for the

purpose of operating hospitals and medical nursing and convalescent homes in the County." CCH Act, § 3. The Board was created to operate public hospitals and nursing and convalescent homes "primarily and chiefly for the benefit of the citizens and residents of Citrus County." CCH Act, § 5. The Board is also authorized to operate an ambulance service. § 5.

The CCH Act granted extensive powers to the Board. The Board was granted the authority "to build, erect, expand, equip, maintain, operate, alter, change, lease and repair public hospitals and medical nursing homes and convalescent homes in Citrus County." § 5. The Act defines "operate" to include "build, construct, maintain, repair, alter, expand, equip, lease, finance, and operate." § 2. The Court notes that the

word "expand" is not defined in the Act and may apply to the facilities or to the services provided. The Board has the authority to extend its services to patients from other counties and states. § 5. The Act grants authority for the Board to own and acquire property, to purchase any and all equipment needed and to enter into contracts to carry out the purposes of the Act. §§ 6, 8, 9, and 11.

The Board has been granted the authority to operate with a great deal of independence from the state. The Board may levy taxes, negotiate loans, borrow money, and issue bonds and revenue certificates. §§ 6, 13-15. The Act authorizes the Board to have a quasi-regulatory function in § 10 where the Board "is empowered to and shall adopt all necessary rules and regulations and by laws for the operation of said

hospitals, medical nursing homes and convalescent homes."

The Board's motion is controlled by the most recent Supreme Court precedent, Town of Hallie, supra. To establish state action immunity under the relevant legal standard, a subdivision of a state must establish only that the challenged conduct was part of a clearly articulated and affirmatively expressed state policy. The first step of the analysis is to identify a "clearly expressed state policy" that authorizes the actions of a state agency, municipality or subdivision. 471 U.S. at 38-39. If the anticompetitive activities subject to a Sherman Act claim are a foreseeable consequence of the state delegation, then the "clear articulation" standard is met and the state action doctrine bars the claim. Id. at 42-43.

The precise anticompetitive conduct of the Board that plaintiff challenges in this action is the Board's alleged attempt to be the sole provider in Citrus County of ancillary health care services; specifically, occupational and speech therapy services on an outpatient basis. The Court must examine in detail the statutory framework to determine whether the Board's allegedly anticompetitive conduct in its provision of therapy services in its service area was a foreseeable consequence of the legislature's delegation of power. As noted above, the Florida legislature's delegation of power to the Board in its statutory charter is expansive. Undoubtably, the Board has the power to provide ancillary health care services such as outpatient therapy. The critical question, however, is whether the

legislature contemplated, expressly or by implication, that the Board would occupy the entire field within its service area in a way which would exclude other competitors.

The question presented to the Supreme Court in Town of Hallie was "how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action." 471 U.S. at 40. The Court ruled that it was "not necessary...for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." Id. at 42. A statute sufficiently indicates a state policy which contemplates anticompetitive effects if it authorizes a municipality or state agency to provide a service and

to determine the areas to be served. See id. In Town of Hallie, a Wisconsin statute "specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects." Id. at 43. "[I]n proving that a state policy to displace competition exists, the municipality need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful Parker defense to an antitrust suit." Id. at 39.

The Supreme Court held that the "clear articulation" test does not require that a legislature expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects:

> This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalogue all of the anticipated effects of a statute of this kind....Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal court in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of Parker and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Id. at 43-44.

Since Town of Hallie, the Eleventh Circuit has provided additional guidance concerning state action immunity in antitrust cases. In Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority, 801 F.2d 1286 (11th Cir. 1986), the plaintiff alleged that the Aviation

Authority was violating antitrust laws by the way in which it was restricting the operation of plaintiff's airport limousine service. The Authority was a state agency authorized to develop and administer public airports in the Tampa, Florida, area. The Authority limited limousine service due to vehicular traffic congestion at the airport; however, the plaintiff claimed that the Authority conspired with its competitors to exclude it from airport business.

The Court noted that "[u]nder the teaching of Parker, official conduct is immune from federal antitrust scrutiny if the state legislature 'contemplated the kind of action complained of.'" 801 F.2d at 1289 (quoting Parker, 317 U.S. 341). Because "[t]he Authority was authorized by the state to negotiate contracts with businesses as it may deem necessary for

the development and expansion of the airport and to grant concessions," the Court found that the Authority's actions were contemplated by the state legislature and, therefore, immunized under Parker. Id.

In the instant case, this Court notes that the Board, like the Authority, was created by the Florida Legislature and its trustees were appointed by the Governor. Id. at 1288. Also, both the Board and the Authority were authorized to exercise wide discretion in providing services within a given area. Id. Although neither the Board's actions in expanding into ancillary health care services nor the Authority's actions pertaining to limousine services were specifically authorized by the state legislature, the Court finds that, as with the Authority's actions, the Board's

actions were contemplated by the legislature.

In Falls Chase Special Taxing District v. City of Tallahassee, 788 F.2d 711 (11th Cir. 1986), and Auton v. Dade City, Fla., 783 F.2d 1009 (11th Cir. 1986), plaintiffs claimed that municipalities were violating antitrust laws by monopolizing water and sewage treatment services and by controlling the construction of water wells, respectively. In both cases, the Court held:

> While a general grant of authority to govern local affairs is insufficient to constitute a clear articulation of state policy because the State's position is neutral with respect to the city's conduct, Community Communications Co. v. City of Boulder, 455 U.S. 40, 54-56, it is not necessary for the legislature to state explicitly that it intends or expects the municipality's conduct to have anticompetitive effects.

Falls Chase, 788 F.2d at 713; Auton, 783 F.2d at 1010. The state action immunity applied in both cases because the state statutes cited in the cases indicated that "the legislature recognized that municipal public works often require anticompetitive practices." Id.

Plaintiff argues that all three of these recent Eleventh Circuit cases are tied closer to express authority from the state which clearly contemplates anticompetitive conduct. Plaintiff also argues that, unlike the Board, the defendants in these three cases had special authority to regulate. As noted above, however, the Board had complete authority to regulate the operation of the hospitals, medical nursing homes and convalescent homes in Citrus County. Although the state authority which contemplated anticompetitive conduct was

clearer in the cases cited, the CCH clearly evidences a state policy which contemplated the Board's movement into the area of outpatient therapy services. The express grant of authority which defined the Board's purpose and area of operations may be fairly construed to contemplate that the Board might displace competition for outpatient services in Citrus County.

The Court notes that the statutory authority in the instant case is broad and expansive within a specified field and for a particular purpose. Section 3(a) of the CCH states that the Board is "incorporated for the purpose of operating hospitals and medical nursing and convalescent homes in the county." The Act clearly authorizes the Board to provide a service. The language of the CCH appears to give the Board wide

discretion in the area of medical, including therapeutic, care in Citrus County. Although other portions of the CCH describe the Board's duties with reference to "public hospitals", section 3 appears to authorize the Board to operate all "hospitals" in the County. The Court finds that the CCH is more than a general grant of authority and that the legislation establishing the Board is a clearly expressed state policy which contemplated the monopolization of ancillary health care services in Citrus County. Based on the CCH and the guidance in Town of Hallie and recent Eleventh Circuit cases, the Court finds that the Board's allegedly anticompetitive actions were a foreseeable consequence of the state legislation.

Plaintiff claims that two other Florida statutes indicate that the Florida legislature did not contemplate the Board's anticompetitive actions. In the "Health Facilities and Health Services Planning Act.," Fla. Stat. § 381.493(2), eight general planning guidelines for individuals in the health care field are listed. The last statement reads as follows: "It is intended that strengthening of competitive forces in the health services industry be encouraged." Because the statement is a general provision which is not mandatory, but merely permissive,[3] the statement does not negate or limit the Board's express authority to operate

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[3]The statutory guidance is similar to one of the general Wisconsin statutes which the Supreme Court discussed in Town of Hallie, 471 U.S. at 42 n.5.

and make rules and regulations concerning the hospitals and medical nursing and convalescent homes in Citrus County.

The second statute cited by plaintiff as evidence that the Florida Legislature did not contemplate anticompetitive actions by the Board is Fla. Stat. § 155.40. The statute authorizes public hospitals to reorganize into not-for-profit Florida corporations. Plaintiff claims that since such new corporations would not be entitled to state action immunity for anticompetitive actions, the statute indicates that there is no ongoing policy that would authorize the Board to engage in monopolistic conduct in ancillary areas. The Court finds that this statute is irrelevant to the issue at hand for two reasons. First, the statute only addresses reorganization of public hospitals into

not-for-profit corporations; it does not address the limits of the powers of state agencies such as the Board. Secondly, it is possible for private actors (like a private not-for-profit corporation) to be entitled to state action immunity from antitrust allegations if the requisite state supervision exists. See Town of Hallie, 471 U.S. at 46.

Upon careful review of the grant of authority to the Hospital Board, the statutes cited by plaintiff, and the allegations in the Third Amended Complaint, the Court finds that the Florida legislature evinced a state policy that contemplates the occupation of parts or all of the particular field of delivering patient care, treatment, and services throughout Citrus County to the displacement of competition. The Board's allegedly anticompetitive conduct

was a foreseeable consequence of the legislature's delegation of power to the Board.

Proof of Unauthorized Anticompetitive Conduct

The second aspect of state action immunity which must be addressed is whether plaintiff has proven that the Board's anticompetitive conduct exceeded the scope of the state action antitrust immunity. If a clearly articulated and affirmatively expressed state policy which contemplates anticompetitive conduct exists, as defined by Town of Hallie, plaintiff "must show a conspiracy not authorized by state law and thus beyond protection of state action immunity. Commuter Transportation, 801 F.2d at 1291. "In Greyhound Rent-A-Car, Inc. v. City of Pensacola, 676 F.2d 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014

(1983), the court found the plaintiff must prove an illicit conspiracy to exclude the entity from state action immunity." Id.

In Falls Chase, supra, the plaintiff argued that the defendant municipality lost its immunity by failing to strictly follow state procedural requirements. 788 F.2d at 714. The Eleventh Circuit noted that in Scott v. City of Sioux City, 736 F.2d 1207, 1215-16 (8th Cir. 1984), cert. denied, 471 U.S. 1003 (1985), the Court "decided that a city's slight departure from state mandated procedures did not abrogate the city's antitrust immunity." Falls Chase, 788 F.2d at 714. This Circuit cited with approval the following language from Scott: "The city's departure from state procedural requisites would have to be extreme to warrant the threat of

antitrust liability. State authorization for antitrust purposes does not require administrative decisions that are free from ordinary errors." Id. Based on the policies supporting immunity from liability for anticompetitive conduct, this court finds that the requirement of an extreme departure from state requirements applies as well to state agencies which depart from their express authority to act.

Plaintiff cites Bolt v. Halifax Hospital Medical Center, 851 F.2d 1273 (11th Cir. 1988), in support of its claim that the Board participated in an illicit conspiracy which would negate the Board's immunity from antitrust liability. In Bolt, the plaintiff, a physician, claimed that a private, profit-making hospital, a private, not-for-profit hospital, and a governmental district hospital

participated in a community-wide conspiracy to revoke the plaintiff's staff privileges at all three hospitals. The Court ruled that such a conspiracy was not included within the scope of any articulated policy of the State of Florida. Although the governmental hospital district had otherwise been clothed with state action immunity, it did not enjoy that immunity for this conspiracy "to rid a medical community of a particular physician." Id. at 1284.

The conspiracy in Bolt was not protected by state action immunity because it was beyond the scope of any "clearly articulated" state policy authorizing it. The removal of physicians from the staffs of other hospitals and the expulsion of physicians from the county medical society are actions which appear to be motivated more

by malice toward the individual physicians than by authorized interests of state hospitals. In contrast to the conspiracy in Bolt, there is no significantly probative evidence in the instant case that the conspiracy between the Board and Beverly, assumed to be true, was not within the scope of the Board's authority.

The Court finds that the allegations in the Third Amended Complaint fall within the scope of patient care services and activities for which the Board is authorized by the CCH. Plaintiff's charge in Count I of a conspiracy to monopolize patient therapy services in nursing homes and other out-of-hospital settings is not extraneous to the powers and purpose conferred on the Board by the Legislature. Similarly, plaintiff's allegations in Count V of a reciprocal

dealing agreement between the Board and Beverly is also within the purview of the Board's statutory authorization.

The mere fact that a "contract, combination, or conspiracy" exists between a state agency entitled to immunity and one or more private actors does not mean that the immunity is automatically lost. As noted above, this Circuit has held that an illicit conspiracy, not any conspiracy, must be proven to remove the state action immunity. Commuter Transportation, 801 F.2d at 1291. The Court finds that plaintiff has failed to make a showing sufficient to establish the existence of a conspiracy that was not authorized by state law and thus beyond protection of state action immunity. Based on all of the evidence presented in support of and in opposition to the motion for summary

judgment, the Court concludes that there is insufficient evidence favoring plaintiff for a jury to conclude that defendant participated in an illicit conspiracy or anticompetitive action which was not contemplated by the state.

Accordingly, it is

ORDERED AND ADJUDGED:

1. That defendant Citrus County Hospital Board's Amended Motion for Summary Judgment as to Counts I through VI of the Third Amended Complaint is hereby granted; and

2. That summary judgment is hereby entered in favor of defendant Citrus County Hospital Board as to Counts I through VI of the Third Amended Complaint.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 9th day of January 1989.

/s/ Howell W. Melton
United States District
Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CENTRAL FLORIDA CLINIC
FOR REHABILITATION, INC.

Plaintiff

vs. 87-71-Civ-Oc-12

CITRUS COUNTY HOSPITAL
BOARD AND BEVERLY ENTERPRISES,
a California Corporation, d/b/a
BEVERLY-GULF COAST, INC.

Defendants

ORAL OPINION

THOMAS, Senior Judge

Defendant Beverly California Corporation, sued herein as Beverly Enterprises, moves for summary judgment on all claims against it, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

Beverly bases its motion on the court's January 9, 1989 order granting summary judgment to defendant Citrus County Hospital Board.

The motion of Beverly finds a direct predicate in its amended answer filed this morning; and also in its first defense and eight defense paragraph 38 of its answer of June 5, 1987.

I hear this for good cause shown since Judge Melton's order of January 25, 1989. Judge Melton found, among other things,

> that the allegations in the Third Amended complaint fall within the scope of patient care services and activities for which the Board is authorized by the [Citrus County Hospital and Medical Nursing and Convalescent Home Act]. Plaintiff's charge in Count I of a conspiracy to monopolize patient therapy services in nursing homes and other out-of-hospital settings is not extraneous to the powers and purpose conferred on the Board by the Legislature. Similarly, plaintiff's allegations in Count V of a reciprocal dealing agreement between the Board and Beverly is also within the purview of the Board's statutory authorization.

> The mere fact that a "contract, combination, or conspiracy" exists between a state agency entitled to immunity and one or more private actors does not mean that the immunity is automatically lost. As noted above, this Circuit has held that an illicit conspiracy, not any conspiracy, must be proven to remove the state action immunity. Commuter Transportation, 801 F.2d at 1291.
>
> The Court finds that plaintiff has failed to make a showing sufficient to establish the existence of a conspiracy that was not authorized by state law and thus beyond protection of state action immunity. Based on all of the evidence presented in support of and in opposition to the motion for summary judgment, the Court concludes that there is insufficient evidence favoring plaintiff for a jury to conclude that defendant participated in an illicit conspiracy or anticompetitive action which was not contemplated by the state.

Defendant Beverly asserts that the immunity found by the court to apply to Citrus County Hospital applies equally to

Beverly. Citing case law, Beverly states that "once an agreement between a state governmental body and purely private parties has been found to meet the tests for state action immunity, the private parties to the agreement are immunized as well as the government body."

In support of its motion defendant Beverly cites several cases, one of which is particularly instructive and authoritative. In Cine 42nd Street Theater Corp. v. Nederlander Organizations Inc., 790 F.2d 1032 (2d Cir. 1986) the court found that private theater operators, acting in concert with a state established urban development corporation, enjoyed state action immunity from antitrust liability. In pertinent part, Cine states

> Because the UDC and its subsidiary had the authority to conduct the challenged sales and award the leases in an

> anticompetitive manner, the City's participation in those sales, which is recognized and affirmatively encouraged in the UDC's enabling legislation, is also protected.
>
> For the same reasons, the private appellees acting in concert with the UDC are also entitled to state immunity. This participation was actively encouraged by the legislature. In fact, one of the fundamental goals of the Act was to have the UDC attract private investors and developers. When the UDC accomplishes its goal in a protected manner, and the participation of private third parties was reasonably contemplated by the legislature, allowing successful tangential attacks on the UDC's activities through suits against the third parties would effectively block the efforts of the UDC.

Similarly, Judge Melton holds, in effect, that joint participation of purveyors of medical services and the Hospital Board, was encouraged by the legislature. I read pertinent parts of his opinion.

> Since Town of Hallie, 471 U.S. 34 (1985), the Eleventh Circuit has provided additional

guidance concerning state action immunity in antitrust cases. In Commuter Transportation Systems, Inc., v. Hillsborough County Aviation Authority, 801 F.2d 1286 (11th Cir. 1986), the plaintiff alleged that the Aviation Authority was violating antitrust laws by the way in which it was restricting the operation of plaintiff's airport limousine service. The Authority was a state agency authorized to develop and administer public airports in the Tampa, Florida, area. The Authority limited limousine service due to vehicular traffic congestion at the airport; however, the plaintiff claimed that the Authority conspired with its competitors to exclude it from airport business.

The Court noted that "[u]nder the teaching of Parker, official conduct is immune from federal antitrust scrutiny if the state legislature 'contemplated the kind of action complained of.'" 801 F.2d at 1289 (Quoting Parker, 317 U.S. 341). Because "[t]he Authority was authorized by the state to negotiate contracts with businesses as it may deem necessary for the development and expansion of the airport and to grant concessions," the court found that the

Authority's actions were contemplated by the state legislature and, therefore, immunized under Parker. Id.

In the instant case, this Court notes that the Board, like the Authority, was created by the Florida Legislature and its trustees were appointed by the Governor. Id. at 1288. Also, both the Board and the Authority were authorized to exercise wide discretion in providing services within a given area. Id. Although neither the Board's actions in expanding into ancillary health care services nor the Authority's actions pertaining to limousine services were specifically authorized by the state legislature, the Court finds that, as with the Authority's actions, the Board's actions were contemplated by the legislature.

....

The Court notes that the statutory authority in the instant case is broad and expansive within a specified field and for a particular purpose. Section 3(a) of the CCH states that the Board is "incorporated for the purpose of operating hospitals and medical nursing and convalescent homes in the county." The act clearly

> authorizes the Board to provide a service. The language of the CCH appears to give the Board wide discretion in the area of medical, including therapeutic, care in Citrus County. Although other portions of the CCH describe the Board's duties with reference to "public hospitals", section 3 appears to authorize the Board to operate all "hospitals" in the County. The Court finds that the CCH is more than a general grant of authority and that the legislation establishing the Board is a clearly expressed state policy which contemplated the monopolization of ancillary health care services in Citrus County. Based on the CCH and the guidance in Town of Hallie and recent Eleventh Circuit cases, the Court finds that the Board's allegedly anticompetitive actions were a foreseeable consequence of the state legislation.

Relying on Cine 42nd Street Theaters and other cited cases, Beverly states "The court's conclusion that the Hospital's alleged activities were immunized requires dismissal of the claims made against Beverly as much as it does the claims against the Hospital."

Plaintiff Central Florida Clinic for Rehabilitation, Inc. (CFCR), in response to Beverly's immunity claim, states

> Plaintiff, Central Florida Clinic for Rehabilitation, Inc. ("CFCR"), has reviewed current case law with respect to third party liability once it has been established that a public body enjoys immunity from antitrust liability due to the state action immunity doctrine. CFCR reluctantly admits that it is unable to find any case law supporting the position that here Beverly Enterprises, Inc. ("Beverly") would be liable for violations of the federal antitrust laws as a result of its dealings with the Board, an immune party.

The case law cited by both Beverly and CFCR supports the position that a finding that the Hospital is immunized under the state action doctrine, compels a finding that Beverly also enjoys immunity. One of the conspirators in the alleged anticompetitive conduct is protected from liability, and to hold the other conspirator liable would defeat the

purpose of the doctrine of state action immunity.

Accordingly, defendant Beverly's motion for summary judgment is granted.

IT IS SO ORDERED.

/s/ William K. Thomas
United States District
Senior Judge